THIRUCHELVASEGARAM MANICKAVASEGAR *a*

v.

MAHADEVI NADCHATIRAM

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-23-08-1997]
10 JUNE 2001

CIVIL PROCEDURE: *Jurisdiction - Discretion - Court to decide which of two enclosures by plaintiff and defendant to be heard first - Whether both enclosures grounded on issue of service - Whether plaintiff's application to cross-examine defendant on issue of service should rightly proceed first* *c*

There were two enclosures before the court, *ie*, encls. 208 and 234. The court had to determine which of the two enclosures should be heard first. Enclosure 208 was filed by the defendant to set aside an *ex parte* order granted by the court to the plaintiff for leave to cite the defendant for contempt and to commit the defendant to prison. Enclosure 234 was an application by the plaintiff to cross-examine the defendant and for leave to accept two affidavits that were technically irregular. The plaintiff argued that the defendant sought to set aside the *ex parte* order on the ground that service was not effected and as the plaintiff was of the firm view that service was effected, the best recourse would be to cross-examine the defendant. It followed, therefore, that encl. 234 should proceed to be heard first. *d* *e* *f*

Held:

[1] The purpose of filing an affidavit of service is simply to prove that service has been effected. The affidavits of service in question were very thorough. They stated in clear terms by whom the documents were served and where and to whom they were served. They were crystal clear and yet the defendant disputed them. *g*

[2] Even if an affidavit is irregular in form, the court may give leave for that affidavit to be filed or used in evidence under O. 41 r. 4 Rules of the High Court 1980. *h*

[3] In *Golden Ocean Assurance Ltd and World Mariner Shipping SA v. Christopher Julian Martin & Others (The Golden Mariner)* (1990), the Court of Appeal by a majority held that the absence of prejudice to the defendants determined the exercise of the court's discretion in favour of the plaintiffs therein. *i*

[4] Since there was a dispute as to whether there had been good and proper service on the defendant, the only way to resolve that dispute would be to hear encl. 234 first and at the same time to put in abeyance the hearing of encl. 208. There were differing views advanced by the parties in regard to the issue of service. The defendant challenged the plaintiff's assertion that service was properly effected and that being the case, it was appropriate that cross-examination ought to be conducted by this court.

[Enclosure 234 to be heard before encl. 208.]

Case(s) referred to:

Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd [2001] 2 CLJ 140 ***(refd)***

Comet Products UK Ltd v. Hawkex Plastics Ltd & Anor [1971] 2 QB 67 ***(refd)***

Co-operative Central Bank Ltd & Anor v. Railway Co-operative Multi-Purpose Society Ltd [1999] 2 CLJ 75 ***(refd)***

Cropper v. Smith [1884] 26 Ch D 700 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Golden Ocean Assurance Ltd And World Mariner Shipping SA v. Christopher Julian Martin & Ors (The Goldean Mariner) [1990] 2 Lloyd's Law Reports 215 ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors & Another Application [1994] 2 MLJ 789 ***(refd)***

Metroinvest Ansalt & Ors v. Commercial Union Assurance Co Ltd [1985] 1 WLR 513 ***(refd)***

President Hotel Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor (Crest Trading Sdn Bhd Intervener) [1995] 4 MLJ 517 ***(refd)***

Tan Lay Soon v. Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener) [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657 ***(refd)***

To Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 2, O. 41 rr. 4, 9(2), O. 62 r. 9

For the plaintiff - Gurbachan Singh (Malik Imtiaz Sarwar); M/s M Segaran

For the defendant - Mahadevi Nadchatiram; M/s Mahadevi Nadchatiram & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

Pure and simple, this was an exercise of judicial discretion as to whether to proceed with the hearing of encl. 208 first instead of hearing encl. 234. It was solely a preference of hearing which particular enclosure first. Must I select to hear encl. 208 before proceeding to hear encl. 234 or must I proceed to hear encl. 234 first before proceeding to hear encl. 208?

Enclosure 208 was a notice of motion filed by the defendant which sought for the following orders:

1. The *Ex-Parte* Order dated 21.02.2001 be set aside;
2. The costs of this application be borne by the plaintiff; (and)
3. Such further or other Order as the Court deems fit.

and the grounds in support of the notice of motion were itemised as follows:

(1) The *Ex-Parte* Order dated 21.02.2001, the *Ex-Parte* Notice of Motion dated 19.12.00, the Statement Under Order 52(of the) Rules of the High Court 1980 dated 19.12.00, the Affidavits of Thiruchelvasegaram a/l Manickavasegar affirmed on 19.12.00, 16.01.01, 19.02.01 and 24.02.01, the Notice of Motion dated 24.02.01 and the Affidavit of Valytham a/l Krishnan affirmed on 19.12.00 were not served upon the Defendant personally and therefore the service is irregular.

(2) The Affidavits of the Plaintiff filed contravene(d) Order 41 Rule 9(2) (of the) Rules of the High Court 1980.

(3) There is non-disclosure of material facts in the Statement dated 19.12.00 and the Plaintiff's Affidavits (in the) Kuala Lumpur High Court Civil Suit No: S5(S2)-23-13-2000 and S2-23-85-2000 filed by the Plaintiff against the Defendant.

(4) As stated in the affidavit of Mahadevi Nadchatiram filed herein.

Enclosure 234, on the other hand, was a notice of motion filed by the plaintiff for the following orders:

(1) The Plaintiff be given leave to cross-examine the Defendant, Mahadevi a/p Nadchatiram and any other deponent of affidavits on the contents of the affidavits affirmed and filed in this proceeding in connection with the proceeding for committal.

(2) Leave be granted to the Plaintiff pursuant to Order 41 Rules 4 and 9(2) of the RHC, 1980 to use the affidavit of the Plaintiff, Thiruchelvasegaram a/l Manickavasegar affirmed on 19/12/2000 and the affidavit of K. Valytham also affirmed on 19/12/2000 or any other affidavits, if any, not- withstanding the affidavits do not have the endorsement or comply with Order 41 Rule 9 (2) of the RHC, 1980 by failing merely to state at the bottom of the affidavits the date of affirmation and (the) date of filing.

(3) Other reliefs as the Court may deem fit.

(4) Costs of and incidental to this application shall be the costs of the committal.

and the grounds in support were listed as follows:

(a) The factual dispute as to service and other allegations could only be determined by cross-examination of the Defendant and any other deponent.

(b) Having regard to the credibility of the Defendant on the disputed issues, in the interest of justice, cross-examination ought to be allowed.

(c) Affidavits which failed to state at the bottom of the affidavits the dates of affirmation and filing do not in any (way) embarrass or prejudice the Defendant.

On the question of discretion, I need to refer to the judgment of Lord Diplock in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 at p. 217 at right hand column at para. "F". This was what his Lordship said:

> In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been **manifestly wrong.**

and these passages certainly reflect the way in which a judicial discretion would be exercised in a given situation and how that discretion is exercised would vary from one judge to another.

Submissions Of The Parties

Mr. Gurbachan Singh with the assistance of Mr. Malik Imtiaz Sarwar acted for the plaintiff and they made their submissions and their submissions went like this. It was pointed out that encl. 208 was an application by the defendant to set aside the *ex parte* order that was granted by me on 21 February 2001 which *ex parte* order was in the nature of leave being granted to the plaintiff to cite the defendant for contempt and to commit the defendant to prison. While encl. 234 was said to be the plaintiff's application for cross-examination and for leave to accept two affidavits which were said to bear some technical irregularities in not stating at the foot thereof the date of the affirmation and the date of filing. It was strenuously argued that encl. 234 ought to be heard first for the reason that by way of encl. 208 the defendant merely sought to set aside the *ex parte* order principally on the ground that there was no proper service on the defendant. It was submitted that if encl. 208 was heard first then encl. 234 would be rendered futile and nugatory. It was pointed out that encl. 234 had direct reference to encl. 208. On the question of service, the affidavit of service of one Gunasakar a/l A. Veeraappan ("Gunasakar") – a legal clerk and part time process service, that was affirmed on 7 March 2001 as seen in encl. 204 should be referred to. There Gunasakar affirmed as follows:

> 2. The facts deposed to herein are within my personal knowledge.
>
> 3. At about 9.50 a.m. on 27/02/2001, the Plaintiff, Thiruchelvasegaram a/l Manickavasegar, and one Stephen Kwan @ Kwan Mun Kon took me in the Plaintiff's car from High Court, Wisma Denmark to the office of the Defendant at No. 15, Tengkat Tong Shin, 50200 Kuala Lumpur to serve the documents in connection with the Committal proceeding and Bankruptcy Notice on Mahadevi d/o Nadchatiram. When we reached in front of the Defendant's office, the Plaintiff and Stephen Kwan left, leaving me to serve the documents.
>
> 4. That I did on 27/02/2001 at 10.10 a.m. at the premises of Messrs. Mahadevei Nadchatiram & Partners at No. 15, Tengkat Tong Shin, 50200 Kuala Lumpur personally serve the abovenamed Mahadevi d/o Nadchatiram, the Defendant in the proceeding with the true copy of Notice of Motion dated 24/02/2001, duly sealed with the seal of the Court, now produced and shown to me and marked as Exhibit 'A' by delivering the same into the hands of Mahadevi d/o Nadchatiram and leaving the same with her.
>
> 5. That at the same time, I did personally serve the said Mahadevi d/o Nadchatiram with the true copies of the following documents (which were tied in one bundle):-

(a) Affidavit-in-Support of the Notis Usul dated 24/02/2001.

(b) Perintah dated 21/02/2001.

(c) Notis Usul *Ex-Parte* dated 19/12/2000.

(d) Kenyataan Menurut Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980.

(e) Affidavits-in-Support of Thiruchelvasegaram a/l Manickavasegar affirmed on 19/12/2000, 16/01/2001 and 19/02/2001.

(f) Affidavit of Valytham affirmed on 19/12/2000.

together with the Exhibits therein respectively referred to and used in-support of the *Ex Parte* Motion and to be used in support of the Motion dated 24/02/2001 by delivering the above documents to Mahadevi a/p Nadchatiram.

6. The Defendant is known to me. The Defendant's legal assistant, Shanti is also known to me. When I attempted to serve the motion and other documents in connection with the above proceedings, Mahadevi d/o Nadchatiram offered to give me RM200.00 for withholding service but I refused.

7. I did on 27/02/2001 endorse on the Motion, the date of the month and the week of the said service on the Defendant.

Another affidavit of service was affirmed by Stephen Kwan @ Kwan Mun Kon on 7 March 2001 as seen in encl. 205 and as a retired electronic engineer he played the role of a process server and this was what he deposed to:

2. The facts deposed to herein are within my personal knowledge.

3. At about 8.30 a.m. on 27/02/2001, the Plaintiff, Thiruchelvasegaram a/l Manickavasegar, and myself were at the High Court at 9th Floor, Wisma Denmark, in connection with the delivery of decision in OS No: R3-17-7-1997 by the Honourable Justice Dato' Haji Faiza B. Tamby Chik. OS No: R3-17-7-1997 was brought by the Plaintiff's wife, Vijayalakshmi Devi a/p Nadchatiram against Mahadevi d/o Nadchatiram to disqualify her from acting for her brothers and sisters. Mahadevi d/o Nadchatiram was present in Court on 27/02/2001. At about 9.30 a.m., the Honourable Justice Dato' Haji Faiza B. Tamby Chik delivered the judgement and soon thereafter, Mahadevi d/o Nadchatiram left the Court in her red Honda car driven by the old Chinese man. At about 9.50 a.m., the Plaintiff and myself took Gunasakar a/l A Veeraappan in the Plaintiff's car from Wisma Denmark to serve on Mahadevi d/o Nadchatiram all documents in connection with the committal proceeding brought by the Plaintiff

against Mahadevi d/o Nadchatiram and the Bankruptcy Notice. Before we took Gunasakar a/l A Veeraappan, Mahadevi d/o Nadchatiram had already left the High Court. I personally drove the Plaintiff's car to the office of Mahadevi d/o Nadchatiram at No. 15, Tengkat Tong Shin, 50200 Kuala Lumpur. The Plaintiff was also in the car. From Wisma Denmark to Defendant's office is only about 10 minutes drive. At about 10.00 a.m., we reached the front of the Defendant's office. I did see Mahadevi d/o Nadchatiram's Honda car parked in front of her office. Mahadevi, Shanti and the Chinese driver were also standing in front of her office. When Mahadevi d/o Nadchatiram came to the High Court, she came in her red Honda car driven by the old Chinese man. The Plaintiff and myself left Gunasakar a/l A Veeraappan to serve the documents. In fact, the Plaintiff was keen to see the documents were served on Mahadevi d/o Nadchatiram as she is often away in India.

4. I was told by the Plaintiff, Thiruchelvasegaram a/l Manickavasegar to accompany him to the High Court at Seremban on 28/02/2001 to personally serve on Mahadevi d/o Nadchatiram, the Defendant herein, the several documents in connection with proceedings brought for committal against Mahadevi d/o Nadchatiram in the above matter and the bankruptcy notice.

5. I was told by the Plaintiff to serve the documents as Mahadevi Nadchatiram & Partners had disputed earlier service on 27/02/2001 of the documents on Mahadevi d/o Nadchatiram by Gunasakar a/l A Veeraappan also known as Stephen. Copies of the letters are now produced, annexed herein and marked as Exhibit 'A'.

6. On the morning of 28/02/2001, I accompanied the Plaintiff and another lawyer by the name of Mr. Siva to the High Court at Seremban as the Plaintiff and Mr. Siva had before the Deputy Registrar, High Court Seremban several reviews of taxation in connection with the Seremban High Court Civil Suit No: 22-34-91 consolidated (with) Seremban High Court OS No: 24-286-90. The Defendant and Shanti were the lawyers involved in the aforesaid same reviews of the taxation in the Seremban High Court Civil Suit No: 22-34-91 consolidated (with) Seremban High Court OS-24-286-90. At about 9.00 a.m. on 28/02/2001, Mahadevi a/p Nadchatiram and Shanti were present at the High Court, Seremban.

7. That I did on 28/02/2001 at about 9.20 a.m. at the premises of the High Court Seremban personally serve the abovenamed Mahadevi d/o Nadchatiram, the Defendant in the proceeding with the true copy of Notice of Motion dated 24/02/2001, duly sealed with the seal of the Court, now produced and shown to me and marked as Exhibit 'B' by delivering the same into the hands of Mahadevi d/o Nadchatiram and leaving the same with her.

8. That at the same time, I did personally serve the said Mahadevi d/o Nadchatiram with the true copies of the following documents (which were tied in one bundle):-

(a) Affidavit-in-Support of the Notis Usul dated 24/02/2001.

(b) Perintah dated 21/02/2001.

(c) Notis Usul *Ex-Parte* dated 19/12/2000.

(d) Kenyataan Menurut Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980.

(e) Affidavits-in-Support of Thiruchelvasegaram a/l Manickavasegar affirmed on 19/12/2000, 16/01/2001/ and 19/02/2001.

(f) Affidavit of Valytham affirmed on 19/12/2000.

together with the Exhibits therein respectively referred to and used in-support of the *Ex Parte* Motion to be used in support of the Motion dated 24/02/2001 by delivering the above documents to Mahadevi d/o Nadchatiram.

9. The Defendant is known to me.

10. When I served the aforesaid documents on Mahadevi d/o Nadchatiram, the said Defendant, Mahadevi d/o Nadchatiram, got angry and threw the documents that were served on her on the floor. Shanti, who was nearby Mahadevi d/o Nadchatiram, collected the documents from the floor and threw at the Plaintiff who was also at that time standing by my side when I served the aforesaid documents on the Defendant. The Court's staff intervened and one of the Court staff collected the documents from the floor. Thereafter, a police report was lodged. A copy of the police report is now produced, annexed hereto and marked as exhibit 'C'.

11. I did on 28/02/2001 endorse on the Motion, the date of the month and the week of the said service on the Defendant.

But the defendant was adamant and disputed both services and she contended that there was no service at all. In encl. 207, the defendant affirmed an affidavit on 16 March 2001 and there she narrated her own version of what had transpired. This was what she deposed to:

(1) I am the Defendant in the above mentioned consolidated actions and the facts deposed to herein are within my own personal knowledge and from information which I believe to be true except where otherwise stated to the contrary.

(2) I crave leave to refer to the Notice of Motion dated 24.02.2001 and the Affidavit of Thiruchelvasegaram s/o Manickavasegar affirmed on 24.02.2001 (hereinafter called the 'Plaintiff's Affidavit'). I also refer to the *Ex-parte* Order of Court dated 21.02.01, the Plaintiff's *Ex-parte* Notice of Motion dated 19.12.00, the Plaintiff's affidavits affirmed on 19.12.00, 16.01.2001, 19.02.2001 and the Statement dated 19.12.2000 and the Affidavit (of) Valytham a/l Krishnan dated 19.12.2000.

(3) I am swearing this Affidavit strictly without prejudice to my right to challenge the improper service of the following documents enumerated below, that is:-

(a) The *Ex-parte* Notice of Motion dated 19.12.2000;

(b) The Statement dated 19.12.2000 pursuant to Order 52 Rule 2(2) of the Rules of the High Court 1980;

(c) The Plaintiff's Affidavits affirmed on 19.12.2000, 16.01.2001, 19.02.2001;

(d) Affidavit of Valytham s/o Krishnan affirmed on 19.12.2000;

(e) The Order of Court dated 21.02.2001;

(f) The Notice of Motion dated 24.02.2001;

(g) The Plaintiff's Affidavit affirmed on 24.02.2001.

(4) I am informed by my staff that on 27.02.2001 at approximately 9.30 a.m., the Plaintiff's solicitors' process-server called at my office with the purpose of serving upon me the documents enumerated in 2 (a) to (g) above. However at that material time I was engaged in court for a matter *vide* Kuala Lumpur High Court Originating Summons No: R3-17-7-97 before the Honourable Justice Dato' Faiza Tamby Chik. However, my legal assistant, Shanti, was present in the office. The Plaintiff's solicitors process-server upon seeing Shanti, insisted that she was me and left the said documents at my office, whereupon my solicitors immediately sent a letter dated 27.02.2001 to the Plaintiff's solicitors informing the same. The letter dated 27.02.2001 is annexed herewith and marked as Exhibit 'MD-1'. My solicitors also informed the Plaintiff's solicitors of a fixed appointment to serve the documents upon me but they did not come and serve the documents upon (me).

(5) As the said documents in paragraph(s) 2(a) to (g) have to be served personally upon me, the service of the said documents at my office is irregular.

(6) Subject to paragraphs 2, 3 and 4 above, I am further raising a preliminary objection that the Plaintiff's affidavits affirmed on 19.12.2000, 16.01.2001 and 19.02.2001 and 24.02.01 contravene Order 41 Rule 9 (2) of the Rules of the High Court 1980.

(7) Without prejudice to paragraphs 2, 3, 4 and 5 above, I wish to state as follows:-

(a) The Plaintiff is filing this committal proceeding as he claims that I have breached the injunction order of Justice Dato' James Foong made on 22.01.2000 in this consolidated action. I have appealed against the said decision *vide* Court of Appeal Civil Appeal No: W-02-113-2000. The appeal has been heard by the Court of Appeal and is now reserved for decision.

(b) On 27.01.1997, the Plaintiff lodged a complaint against me to the Advocates & Solicitors Disciplinary Board (hereinafter called 'the Board') whereby the Plaintiff alleged that I had submitted a written submission dated 11.10.1993 in respect of Seremban High Court Civil Suit No: 22-61-93. A copy of the Plaintiff's said complaint to the Board is annexed herewith and marked as Exhibit 'MD-2'.

(c) Pursuant to the said complaint, the Board wrote to me requesting for an explanation as to why action under Section 100 of the Legal Profession Act 1976 should not be taken against me. A copy of the Board's letter dated 14.03.98 is annexed herewith and marked as Exhibit 'MD-3'.

(d) Whereupon I forwarded my replies dated 08.04.88 and 17.6.99 to the Board. These documents are annexed in the Plaintiff's affidavit affirmed on 19.12.00.

(e) Subsequently, I received a letter dated 09.10.2000 from the Board informing me that an Investigating Tribunal had been appointed. Subsequent to this letter dated 09.10.2000, I received a letter dated 24.10.2000 from the Board requesting me to appear before the Investigating Tribunal for the purpose of a formal investigation and hearing into the complaint by the Plaintiff. Copies of the letters dated 09.10.2000 and 24.10.2000 are annexed herewith and marked as exhibit 'MD-4'.

(f) Pursuant to the Board's letters dated 09.10.2000 and 24.10.2000, the Plaintiff wrote to the Board informing the Board that the Investigating Tribunal had not complied with the mandatory statutory requirements of Section 101(4)(a)(i) of the Legal Profession Act 1976. The Plaintiff's letter dated 30.10.2000 to the Board is annexed herewith and marked as Exhibit 'MD-5'.

(g) Upon my objections to the Board, the appointment of Dato' VL Kandan as chairman was revoked. My letter dated 27.10.2000 and the Board's letter dated 08.11.2000 are annexed herewith and marked as Exhibit 'MD-6'.

(h) By the letter dated 13.11.00, I was then informed by the Board that a new Investigating Tribunal had been appointed. A copy of the Board's letter dated 13.11.2000 is annexed and marked as Exhibit 'MD-7'.

(i) Thereafter pursuant to the provisions of Section 101(4)(a)(i) of the Legal Profession Act 1976 by letter dated 27.11.2000, I forwarded to the Board five sets of the Reply to the complaint against Ms. Mahadevi Nadchatiram by Mr. M. Thiruchelvasegaram dated 27.11.2000 together with the annexures.

(j) Upon receipt of the above documents, the Board forwarded a copy of the same together with the Record of Complaint to the Plaintiff. The Board's letter dated 04.12.2000 enclosing the documents is annexed herewith and marked as Exhibit 'MD-8'.

(k) Thereafter by letter dated 5th January 2001 the Plaintiff forwarded his reply to the Board. A copy of the Plaintiff's letter dated 05.01.2001 and the annexures are annexed herewith and marked as Exhibit 'MD-9'.

(8) As a result of my replies to the Board (which is the subject of the committal proceedings commenced by the Plaintiff) the Plaintiff commenced two defamation actions against me *vide* Kuala Lumpur High Court Civil Suit Nos: S2(S5)-23-13-2000 (hereinafter called 'the third action') and Kuala Lumpur High Court Civil Suit No: S2-23-85-2000 (hereinafter called 'the fourth action'). The Writ of Summons and Statement of Claim *vide* Suit No: S2(S5)-23-13-2000 is annexed herewith and marked as Exhibit 'MD-10' and the Writ of Summons and Statement of Claim *vide* Suit No: S2-23-85-2000 is annexed herewith and marked as Exhibit 'MD-11'.

(9) My defence *vide* Suit No: S2(S5)-23-13-2000 is annexed herewith and marked as Exhibit 'MD-12' and my defence vide Suit No: S2-23-85-2000 is annexed herewith and marked as Exhibit 'MD-13' whereby I have throughout maintained that the said replies to the Board are not in any manner defamatory of the Plaintiff. I have also applied to strike out the third and fourth actions. The Plaintiff here claims that I have breached the injunction order dated 22.01.2000. In the light of the fact that the issue of whether the publications are defamatory in the first instance, is sub-judice, it is clearly an abuse of the process of the Court on the part of the Plaintiff to file this application. If this application is granted, serious prejudice will be caused to me if the court thereafter dismisses the third and fourth actions against me. I adopt and repeat herein all the averments in my defences to the third and fourth actions (Exhibits MD-12 and MD-13 above).

(10) I crave leave to state that there has been material non-disclosure by the Plaintiff in his affidavits and in the statement filed by the Plaintiff pursuant to Order 52 Rule 2(2) of the Rules of the High Court 1980 (hereinafter called the statement) of the pending third and fourth actions which warrant the *ex-parte* order dated 21.02.2001 granting the Plaintiff leave to commence committal proceedings to be set aside and the Notice of Motion dated 24.02.2001 to be dismissed with costs.

(11) I further crave leave to state that by his letter dated 30.10.2000 (Exhibit 'MD-5' above), the Plaintiff himself brought to the attention of and requested the Board that there be strict compliance of Section 101(4)(a) (i) and (ii) of the Legal Profession Act 1976 (LPA 1076) whereby only the explanation sought and given to the Investigating Tribunal under the said provision can form part of the appeal record. My reply dated 27.11.2000 was forwarded to the Board pursuant to Exhibit 'MD-5'. Furthermore pursuant to the provisions of LPA 1976, I am compelled to forward my reply to the Board if I wish to be heard on the complaint. There is no libellous statement whatsoever in (my) reply letter dated 27.11.2000. The annexures contained are mere court documents and my earlier replies. There is no form of publication of libel whatsoever.

(12) I further state that whatever form of publication was carried out by the Plaintiff himself for the following reasons:-

(a) In January 1997 the Plaintiff asked the Board to institute disciplinary proceedings against me *inter alia* (for) the following allegations:-

(i) that I had made scandalous and libellous statements to the court;

(ii) that I had made them knowing them to be untrue;

(iii) that I had made such statements to vent my vengeance and pursuant to a conspiracy;

(iv) in this action herein *vide* Suits S2(S5)-23-04-97 and S5-23-08-97 (hereinafter called '04' and '08') the Plaintiff made identical allegations to those he made to the Board.

(b) On 16.10.2000, the Plaintiff's solicitors sent to the Board the Grounds of Judgement of Judge Dato' James Foong in suits '04' and '08' delivered on 22.01.2000. In his covering letter the Plaintiff asserted in bold type the following:-

'The findings of the trial judge are highly relevant in respect of the complaint'. The Plaintiff's solicitors letter dated 16.10.00 is annexed herein and marked as Exhibit 'MD-14'.

(c) The Plaintiff thereby chose in furtherance of his complaint to communicate to the Board the following:-

(i) all the defamatory allegations complained thereof in suits '04' and '08'.

(ii) a summary of the evidence purportedly relied upon by me in support of my defences of justification and/or relied upon by me in rebuttal of the Plaintiff's allegations of malice and conspiracy.

(d) The Plaintiff knew that I did not accept the findings of the trial judge and was pursuing an appeal in which, *inter alia*, I was contending that the trial judge had failed to take into account a number of submissions and a number of evidential matters.

(e) The Plaintiff knew that by himself relying on the contested judgement of Justice Dato' James Foong, he himself was creating a situation where the Board and the Investigating Tribunal would have to consider the totality of the evidence and arguments that had been presented by me to the trial judge and (the) grounds of appeal.

(f) I crave leave to state that the Plaintiff brought these committal proceedings for an improper purpose knowing well that I was going to implement 2 orders of court which would affect the Plaintiff's wife's share in our family company called Nadchatiram Realities (1960) Sdn Bhd whereby she would inherit a reduced share. The Plaintiff's wife is my sister. The 2 orders of court dated 07.05.97 and 14.12.00 are annexed herein and marked as Exhibit 'MD-15'.

(13) I crave leave to state that there are several irregularities by the plaintiff in the obtaining of the *ex-parte* order dated 21-02-01. The Plaintiff's clerk Valytham s/o Krishnan filed an affidavit in Court that he served the Order of Court dated 22.01.00 on me on 13.07.00 at 8.45 a.m. at the Court of Appeal. I state that the order was not served upon me and I refer to my solicitor's letter dated 17.07.00 which is annexed herein and marked as Exhibit 'MD-16'.

(14) A further irregularity is that the Plaintiff's Supplementary Affidavit affirmed on 19.02.2001 which was served at my office does not have an exhibit 'T-3' not annexed to it.

(15) I crave leave to refer to the Notice of Motion dated 24.02.2001 and state that I am shocked at the prayers therein for I honestly and reasonably believed in relation to Paragraph (a) that I did not publish or circulate any libellous matter to the Board as interpreted by the Plaintiff. I submitted the documents in defence of my case in reply to the complaint made to the Board by the Plaintiff against me.

(16) In reply to prayer (b) of the Motion, I deny the allegations therein and state that I would not bring the judiciary into disrepute as stated by the Plaintiff and I am fully aware when the Judgment was pronounced against me that there was a permanent injunction against me.

(17) The Plaintiff is relying on his first affidavit affirmed on 19.12.2000 (hereinafter called the 'Plaintiff's First Affidavit') and I wish to reply as follows:-

(18) Paragraph 5 of the Plaintiff's First Affidavit is denied.

(19) Paragraph 6 of the Plaintiff's First Affidavit merely states the sequence of events.

(20) In reply to paragraph 10 of the Plaintiff's First Affidavit I state that my explanation dated 27.11.2000 did not carry any libel. From the very documents, it can be seen that there is no libel. The allegations in Paragraph 10 of the Plaintiff's First Affidavit are denied. The documents were only forwarded as a defence to the complaint lodged by the Plaintiff to the Board against me.

(21) When I sent my documents on 27.11.2000 to the Board it was merely to show that these suits existed between the Plaintiff and myself and my siblings and to show that it was only in the Plaintiff's actions against me that he had specified the quantum of damages sought (the Plaintiff has sued me for RM140 million in toto) whereas in claims against my brother and sister, no amounts were specified. Furthermore there was duplicity in the claims and the Plaintiff was trying to get two sets of damages for the same claim. In respect of Exhibit 'T-6' annexed to the Plaintiff's First Affidavit, which is the Order dated 28.11.00 I crave leave to state that at the material time that my reply dated 27.10.00 was forwarded to the Board, the said Order was not in existence. Furthermore the said Order clearly states that it is without prejudice to Kuala Lumpur High Court Civil Suit No: S5-23-08-97 and S5(S2)-23-04-97 (this action herein).

(22) In reply to paragraph 11 of the Plaintiff's First Affidavit, I merely sent the documents as a defence to the Plaintiff's complaint. I am a lawyer of 20 years standing. Only the Court of Appeal can reverse the decision and not a tribunal of inquiry. Therefore, the Plaintiff is wrong to discredit me and state that I am trying to get the case re-heard/ dismissed. I have not undermined the integrity of the judiciary and administration of justice. I have four sisters and two brothers who are barristers at law and I respect this profession as I intend to practise as a lawyer always.

(23) In reply to Paragraph 12 of the Plaintiff's First Affidavit, the Plaintiff makes reference to his Statement (under) Order 52 Rule (2) RHC (hereinafter called 'the Statement') and my reply in relation to the Statement is as follows:-

(a) In reply to Paragraph 4 of the Statement, I state that the Plaintiff is requesting for me to be committed to prison not because I have committed contempt of Court but with the ulterior motive that I will not execute the Order of the Court dated 07.05.00 and 14.12.2000 (Exhibit 'MD-15' above) whereby I will inherit properties left by my late father's Company to the extent of RM6.3 million and by order of the Court dated 07.05.1997 a further 70 shares worth RM10 million to RM15 million and damages against the Plaintiff's wife for wrongfully caveating my land which damages I estimate to be in the region of approximately RM15 million. Paragraphs 4 (a) and (b) of the Statement is denied.

(b) Paragraph 4 (c) of the Statement clearly shows that these applications are filed so that the Plaintiff can get more money from me by way of costs. These contempt proceedings were instituted on 19.12.2000 after the Court made the Order dated 14.12.00 (Exhibit 'MD-15'). An explanation surrounding the circumstances is that pursuant to the Order of Court dated 07.05.97 (Exhibit 'MD-15' above) I was granted damages of RM4.9 million with interest (which amounts to around RM6.3 million). By the order dated 14.12.00 the said sum has to be paid within three months failing which the land held under Geran No. 34264 Lot No 13460 Mukim Rasah Daerah Seremban (the said land) would be sold to realise this sum. The said land is the land allocated by my late mother for the Plaintiff's wife. As the said sum of money was not paid within the specified time the land allocated for the Plaintiff's wife has to be sold. I humbly state that this is the reason for the committal proceedings commenced against me.

(c) In reply to Paragraph 5 of the Statement, I state that I have not breached the injunction. All other allegations are denied.

(24) Paragraphs 12, 13, 14 of the Plaintiff's affidavit affirmed on 24.02.01 (hereinafter called the Plaintiff's affidavit) (are) denied. I deny that I contravened the order dated 22.01.00. I state that there has been serious non-disclosure of material facts by the Plaintiff.

(25) In reply to Paragraph 14, I state that I am not guilty of contempt of court.

(26) I crave leave to state that I am using this Affidavit in support of my Notice of Motion to set aside the Plaintiff's *Ex-Parte* Order dated 21.02.01 and in reply to the Plaintiff's Notice of Motion dated 24.02.01.

(27) I therefore pray for:-

(a) Order-in-Terms of my application to set aside the *Ex-Parte* Order dated 21.02.01

(b) Notice of Motion dated 24.02.01 be dismissed with costs.

The plaintiff himself affirmed an affidavit on 20 March 2001 as seen in encl. 210 and there he corroborated the services that were effected on the defendant on 27 February 2001 and 28 February 2001 respectively. In encl. 210 the plaintiff deposed as follows:

1. I am an advocate and solicitor of the High Court of Malaya.

2. I am the Plaintiff in the above-mentioned committal proceeding.

3. The facts deposed to herein are within my personal knowledge save where the contrary appears.

4. I have read what purported to be the Affidavit of Mahadevi d/o Nadchatiram, the Defendant affirmed on 16/03/2001 (hereinafter referred to as 'the Defendant's Affidavit'), in connection with the application to set aside the leave granted for committal.

5.1 In answer to paragraphs 4 and 5 of the Defendant's Affidavit, I state as follows:-

(a) I deny the whole of paragraphs 4 and 5.

(b) At about 8.30 a.m. on 27/02/2001, Stephen Kwan @ Kwan Mun Kon and myself were at the High Court at 9th Floor, Wisma Denmark, in connection with the delivery of decision in OS No: R3-17-7-1997 by the Honourable Justice Dato' Haji Faiza B. Tamby Chik. OS No: R3-17-7-1997 was brought by my wife, Vijayalakshmi Devi a/p Nadchatiram against the Defendant, Mahadevi d/o Nadchatiram to disqualify her from acting for her brothers and sisters. The Defendant, Mahadevi d/o Nadchatiram was present in Court on 27/02/2001. After the Honourable Justice Dato' Haji Faiza B. Tamby Chik delivered the judgement, at about 9.50 a.m., Stephen Kwan @ Kwan Mun Kon and myself took Gunasakar a/l A Veeraappan in my car from Wisma Denmark to serve on the Defendant all documents in connection with the committal proceeding brought by me against the Defendant and the Bankruptcy Notice. Before we took Gunasakar a/l A Veeraappan, the Defendant had already left the High Court. Stephen Kwan @ Kwan Mun Kon drove my car to the office of the Defendant at No. 15, Tengkat Tong Shin, 50200 Kuala Lumpur. At about 10.00 a.m., we reached in front of the Defendant's office. The Defendant, Shanti and the Chinese driver who usually drives the Judgment's Debtor's car were also standing in front of the Defendant's office. Stephen Kwan @ Kwan Mun Kon and myself left Gunasakar a/l A Veeraappan to serve the documents. I wanted to serve the documents as the Defendant is often away in India.

(c) Gunasakar a/l A Veeraappan, who was entrusted with the service, came to my office at about 11.00 a.m., and informed me that he had served the Bankruptcy Notice and other documents in connection with the committal on the Defendant, Mahadevi d/o Nadchatiram who accepted service of the documents but refused to sign. I was also told by Gunasakar a/l A Veeraappan and verily believe that the Defendant offered him RM200.00 to withhold service. In this connection, I crave leave to refer to the Affidavit of Service by Gunasakar a/l A Veeraappan filed in Court.

(d) On 27/02/2001, after the service by Gunasakar a/l A Veeraappan, the Defendant's firm, Messrs. Mahadevi Nadchatiram & Partners sent a letter disputing service. The letter was promptly replied and there were exchange of letters on the same day. The several letters are now produced, annexed and collectively marked as Exhibit 'T-1'.

(e) As there was proceeding at the Seremban High Court on 28/02/2001 in connection with Seremban High Court Civil Suit No: 22-34-91 consolidated with Seremban High Court OS No: 24-286-90, in which matter the Defendant was directly involved, I requested Stephen Kwan @ Kwan Mun Kon to accompany me to the Seremban High Court to serve the documents on the Defendant. When he served the documents on the Defendant, I was present.

(f) On 28/02/2001, Stephen Kwan @ Kwan Mun Kon, who accompanied me to serve the committal proceeding and bankruptcy notice, served the documents on the Defendant. The Defendant refused to accept as she knew the nature of the documents. The Defendant threw the documents on the floor. Shanti, who accompanied the Defendant, collected the documents and threw at me.

(g) Soon after the incident on 28/02/2001, I went to the Seremban Police Station and lodged a police report. Copy of the Police Report is now produced, annexed and marked as Exhibit 'T-2'.

(h) In this connection, I also crave leave to refer to the Affidavits of Service by Stephen Kwan @ Kwan Mun Kon filed in Court.

(i) In fact, previously, when service of documents was effected on the Defendant, she has refused to accept and (the) process server had to leave the documents. Copy of the letter dated 10/03/2000 is now produced, annexed hereto and marked as Exhibit 'T-3'. From this letter, the Defendant's conduct is clear in that total refusal to accept service.

5.2 I state the service is a good service. In this connection, I crave leave to refer to the Affidavit of Service by Gunasakar a/l A Veeraappan and Stephen Kwan @ Kwan Mun Kon. Further, on 02/03/2001, the Defendant applied to the Court of Appeal for a stay including the present committal proceeding. Copy of the motion and the Affidavits are now produced, annexed hereto and marked as Exhibit 'T-4'. The motion came for hearing on 10/03/2001 and the Court of Appeal struck out the motion.

6. In answer to paragraph 6 of the Defendant's Affidavit, I state that there is no merit in the Defendant's contention. Further, the Defendant did not give notice of any such objections and therefore, such objections should not be entertained by this Honourable Court.

7. In answer to paragraph 7(a) of the Defendant's Affidavit, I state that as there is no stay of the Order of Justice Dato' James Foong made on 22/01/2000 in the consolidated actions, the Defendant must comply with the Order.

8. In answer to paragraph 7(f) of the Defendant's Affidavit, I state that as follows:-

(a) The Defendant has again misrepresented and distorted the facts thereby showing she is not a truthful person. The correct facts are as follows:-

(a) On 09/10/2000, the Advocates & Solicitors Disciplinary Board sent a letter to the Defendant asking for an explanation under Section 101(4) of the Legal Profession Act, 1976. Copy of the letter is now produced, annexed hereto and marked as Exhibit 'T-5'. This letter was not addressed to me. In this connection, I crave leave to refer to the letter.

(b) The Chairman of the Investigating Tribunal proceeded to fix the hearing even before the Defendant gave any explanation as required under Section 101(4)(a) of the Legal Profession Act, 1976. Copy of the letter is now produced, annexed hereto and marked as Exhibit 'T-6'.

(c) As I was not notified of the letter dated 09/10/2000 earlier marked as Exhibit 'T-5', a letter was sent by me to the Board (and that the Board) must ensure that section 101 (4) (a) of the Legal Profession Act, 1976 is complied with. I continued to send reminders as I wanted to ensure the whole disciplinary proceeding is not vitiated by failure to observe the mandatory provisions until I was notified by the Board that the letter dated 09/10/2000 (Exhibit 'T-5') was in fact, sent to the Defendant. In this connection I now produce, annexed hereto and marked as Exhibit 'T-7' the letters to the Board and from the Board.

(d) By a letter dated 27/10/2000, the Defendant wrote to the Board and me asking the assurance that no further actions and proceedings would be taken against her as she wanted to include certain libellous documents. Both the Board and myself refused to give any assurance. In fact, the Board has no powers to give any assurance. The letter dated 27/10/2000 was sent as a means to further libel me with impunity. The Defendant then proceeded to give a reply and enclosed several documents and thereby, not only breached the injunctions, but committed contempt of Court by total disrespect to the administration of justice. Copies of the letters are now produced, annexed hereto and marked collectively as Exhibit 'T-8'. In this connection, I specifically refer to the nature of the documents enclosed in the letter. By these documents, the Defendant as a whole wanted to show that the Board should not follow the decision of the Trial Judge and the injunctions (that were) granted.

9. In answer to paragraph 7 (i) of the Defendant's Affidavit, the reply is now the subject matter of the complaint.

10. In answer to paragraph 8 of the Defendant's Affidavit, S2(S5)-23-13-2000 was commenced (on) 28/02/2000 and the causes of actions were not in respect of publications of documents on 27/11/2000. S2(S5)-23-13-2000 was filed on 29/12/2000 after the committal proceedings were instituted.

11. In answer to paragraph 9 of the Defendant's Affidavit, the reply together with the documents submitted as set out in paragraph 9 of my affidavit affirmed 19/12/2000 clearly constitute a libel and a breach of the injunction. Further, in the defences filed, the Defendant has pleaded justification thereby further showing the Defendant's true intention.

12. In answer to paragraph 10 of the Defendant's Affidavit, I deny there is (any) non-disclosure. In this connection, I crave leave to refer paragraph 10 above.

13. In answer to paragraph 11 of the Defendant's Affidavit, the Defendant has distorted the facts. The Defendant published the reply dated 27/11/2000 as a result of the letter dated 09/10/2000 from the Advocates & Solicitors Disciplinary Board asking for an explanation. I further state that the Defendant well knowing there is a permanent injunction, asked for permission for immunity and thereafter, proceeded to send the reply. The letter dated 09/10/2000 and the annexures constitute a serious libel and breach of injunction. These documents were published after the injunction.

14. In answer to paragraphs 12 (a), (b), (c), (d) and (e) of the Defendant's Affidavit, the Defendant has totally misrepresented the facts by claiming that the publication was carried out by myself and thereby showing that the Defendant has no respect for the permanent injunction granted against her. As regards the nature of the complaint, I now produce, annexed hereto and marked as Exhibit 'T-9' the complaint lodged by me.

15. In answer to paragraph 12 (f) of the Defendant's Affidavit, I deny the allegations. These allegations were brought as an excuse for the breach of the injunction.

16. In answer to paragraph 13 of the Defendant's Affidavit, the Defendant's averments are baseless. The service is a good service but the Defendant refused to accept. This is a further instant of Defendant's conduct to avoid service of the Order for injunction. By affirming this Affidavit to show that she refused to accept the Order for injunction, the Defendant has also committed the act of contempt of Court. Immediately after the service of the Order, my solicitors sent a letter regarding service and refusal to accept by the Defendant. Copy of the letter is now produced, annexed and marked as Exhibit 'T-10'.

17. In answer to paragraph 14 of the Defendant's Affidavit, I deny the averment. The Defendant has totally misread the Affidavit. The Defendant did not dispute in the letter dated 27/02/2001 regarding documents enclosed and exhibits annexed. Further, I aver the Defendant also came up with the similar excuse that the Bankruptcy Notice served was incomplete. By such claim, the Defendant is not a truthful person.

18. In answer to paragraph 15 of the Defendant's Affidavit, I contend that such allegation is not a defence. Further, by the defences subsequently filed pleading justification, the Defendant has committed contempt of Court.

19. In answer to paragraph 16 of the Defendant's Affidavit, the Defendant's act clearly shows that she has brought the judiciary into disrespect.

20. In answer to paragraphs 17 to 26 of the Defendant's Affidavit, I contend that in an application to set aside the *Ex-Parte* leave, the Defendant cannot go into the merits of the application.

21. Further, in answer to paragraph 20 of the Defendant's Affidavit, I contend the explanation dated 27/11/2000 and the annexures constitute a grave breach of injunction. Because of the permanent injunction, the Defendant cannot publish any documents which are defamatory of the Plaintiff.

22. In answer to paragraphs 21 and 22 of the Defendant's Affidavit, the Defendant's averments are baseless and having published the documents, the Defendant cannot claim her intentions are innocent and different. I contend by pleading these averments the Defendant is not truthful. I further state the Order 28/11/2000 marked as Exhibit 'T-6' in my Affidavit affirmed on 19/12/2000 was not made without prejudice to the Kuala Lumpur High Court Civil Suit No: S5-23-08-1997 and S2(S5)-23-94-97. In this connection, I crave leave to refer to Exhibit 'T-6'. By this averment, it is clear that the Defendant has lied to the Court.

23. In answer to paragraphs 23 (a) and (b) (of) the Defendant's Affidavit, I deny the allegations that I filed the committal proceeding with ulterior motive. The Defendant's letter dated 27/11/2000 and the annexures were served on me by the Advocates & Solicitors Disciplinary Board on 04/12/2000. On 19/12/2000, I filed the committal proceeding. The Defendant has brought these baseless allegations to discredit me and find excuse for the contempt of Court.

24. In answer to paragraph 23 (c) (of) the Defendant's Affidavit, I contend the Defendant has breached the injunction.

25. In answer to paragraph 24 (of) the Defendant's Affidavit, I deny that there was any non-disclosure. I contend that the Defendant has breached the Order.

26. In answer to paragraph 25 (of) the Defendant's Affidavit, I contend that the Defendant is guilty of contempt of Court.

27. In answer to paragraphs 26 and 27 (of) the Defendant's Affidavit, I contend that the Defendant's motion dated 19/03/2001 be dismissed.

These differences in affidavit evidences were said to be acute – so acute that it was submitted that this court would find it difficult to make a finding of fact whether there had been good and proper service on the defendant unless there was cross-examination. It was for these reasons that the plaintiff preferred encl. 234 to be heard first. Now, O. 62 r. 9 of the Rules of the High Court 1980 ("RHC") states as follows:

> An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, where it was served and how and must be in one of the forms in Form 137.

It is quite obvious that the purpose of filing an affidavit of service is simply to prove that service has been effected. The two affidavits of services in encls. 204 and 205 were very thorough. It stated in clear terms by whom the documents were served, the dates on which they were served and where and to whom they were served. It was crystal clear and yet the defendant disputed them.

Madam Mahadevi, a lawyer by profession, argued her own case. Politely she submitted that encl. 208 should be heard first because, according to her, encl. 208 was for the purpose of setting aside the *ex parte* order that was granted by me on 21 February 2001. She submitted that the affidavit in support of encl. 208 can be seen in encl. 207 which was an affidavit affirmed by herself on 16 March 2001. It was part and parcel of her submission that she had raised a preliminary objection in her affidavit in encl. 207 especially at para. 6 thereto where she challenged the plaintiff's affidavits affirmed on 19 December 2000, 16 January 2001, 19 February 2001 and 24 February 2001 on the sole ground that it contravened O. 41 r. 9(2) of the RHC. It is certainly useful to reproduce O. 41 r. 9(2) of the RHC and it is worded in this way:

> Every affidavit must be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

But it is useful to note that even if an affidavit is irregular in form, the court may give leave for that affidavit to be filed or used in evidence. Indeed O. 41 r. 4 of the RHC clearly states that:

> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

It was her submission that the substantive motion of committal in encl. 201 together with encl. 234 need not be heard by me if I were to allow her to submit on encl. 208. It was part and parcel of her submission that the *ex parte* order granted by me on 21 February 2001 was irregularly obtained and she forcefully pointed out that she had good grounds in encl. 208 to show that the whole procedure was defective. She too submitted that during the course of hearing her submission on encl. 208, I would be enlightened and I would then appreciate that there was no necessity to cross-examine her because such an exercise would tantamount to opening up the whole issue. She stressed that the present proceeding was in the nature of a contempt proceeding. She then ventured into specifics. She submitted that the plaintiff's request for cross-examination was unlimited. That the plaintiff wanted to cross-examine the defendant together with the other deponents of the affidavits in regard to the contents of the affidavits. It was, according to her, far too wide. Specifically she submitted that prayer (1) of encl. 234 was far too wide. I have earlier on reproduced prayer (1) of encl. 234 in its original text and it cannot be denied that the scope of that prayer is indeed far too wide. I too found that prayer (2) of encl. 234 was also far too wide. She then submitted that affidavit evidence would be sufficient to dispose off a committal proceeding. She

reiterated that if I were to hear encl. 208 first, I would then find that there was no necessity to hear encl. 234. With vigour and vitality, she submitted that the *ex parte* order for leave to commit her to prison had already been perfected and now the plaintiff realised that two affidavits supporting his application were defective and that it was too late in the day for the plaintiff to "re-visit" the *ex parte* order because the court was said to be *functus officio*. Once again she reiterated that encl. 208 should be heard first especially that part pertaining to her preliminary objection in para. 6 thereof.

Mr. Gurbachan Singh replied. He pointed out that only two affidavits of the plaintiff had technical defects and he described it as encls. 189 and 190. Enclosure 189 was the affidavit in support of the plaintiff's application for leave while encl. 190 was only an affidavit of service of one Valytham a/l M. Krishnan in regard to the order of injunction against the defendant. According to Mr. Gurbachan Singh all the other affidavits did not have these defects. In regard to O. 41 r. 9(2) of the RHC, he submitted that the plaintiff had come by way of encl. 234 to seek leave of this court to use encls. 189 and 190. He submitted that there is a provision in the RHC to seek leave and the plaintiff has a legitimate right to apply to seek leave. He submitted that it was, pure and simple, an irregularity which was curable under O. 41 r. 9(2) of the RHC. Furthermore, he submitted that this court could condone the irregularity by resorting to O. 2 of the RHC. Always adopting an open mind and more so in this case, I need to refer to the case of *Cropper v. Smith* [1884] 26 Ch D 700 where Bowen LJ remarked at p. 710 that he thought that it was appropriate to state the legal position in this way:

> Now, I think it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.

Continuing at the same page, his Lordship Bowen LJ said:

> I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party.

Again adopting an open mind and always receptive to new ideas and the ever changing legal trends, I would like, at this juncture, to refer to the speech of Cumming-Bruce LJ in *Metroinvest Ansalt And Others v. Commercial Union Assurance Co. Ltd* [1985] 1 WLR 513 where at p. 521 his Lordship aptly said:

> I would say that in most cases the way in which the court exercises its powers under Order 2, rule 1 (2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Order 2, rule 1 (2) as being so framed as to give the court the widest possible power in order to do justice.

Again acting cautiously and merely expounding the law as perceived by other learned judges before me, I need to refer to the case of *Golden Ocean Assurance Ltd And World Mariner Shipping S.A. v. Christopher Julian Martin And Others (The Goldean Mariner)* [1990] 2 Lloyd's Law Reports, 215 where the Court of Appeal by a majority held that the absence of prejudice to the defendants determined the exercise of the court's discretion under O. 2 in favour of the plaintiffs there.

In expounding the law as perceived by other eminent judges before me, I am not adjudicating on either encl. 208 or encl. 234 at this juncture. I must put this on record. Fairness is the name of the game. Judicial fairness is what everyone is seeking for.

Mr. Gurbachan Singh then proceeded to apply to delete certain words that appear in prayer (1) to encl. 234. He pointed out that the words that read **"and any other deponent"** appearing in prayer (1) of encl. 234 ought to be deleted and he orally applied for those words to be deleted. He submitted that at the time of filing encl. 234, the plaintiff had a valid reason to put in those words because the defendant alleged that on 27 February 2001 the service of the substantive motion in encl. 201 was not made on her but on Miss Shanti. Hence that prayer was sought and now the plaintiff was abandoning this prayer because Miss Shanti did not file an affidavit. He submitted that the plaintiff was not going on a merry go round. He pointed out that the matter was made clear in an affidavit in support in encl. 233 at paras. 6 and 7. He pointed out that the plaintiff could not go beyond these issues. He then submitted that the cross-examination of the defendant would only be confined to paras. 6 and 7 of encl. 233. He further submitted that cross-examination would place this court in a better position to assess credibility and to determine the vital issue of whether service was in fact effected on 27 February 2001 and on 28 February 2001 or whether service was in fact defective. It seemed that cross-examination of the defendant would be confined to these areas only. He then pointed out that if this court were to hold that service was good then the question of hearing encl. 208 on the first ground would not arise. He too pointed out that if after hearing encl. 234, this court were to grant leave under O. 41 r. 9(2) of the RHC then the question of hearing encl.

208 on the second ground would also not arise. In regard to the third ground as seen in encl. 208 which was on the alleged non-disclosure, it was submitted that this court could and ought to consider and hear that ground together with the substantive hearing of encl. 201. Alternatively Mr. Gurbachan Singh submitted that if encl. 208 was to be heard first, then there was no necessity to hear encl. 234.

Madam Mahadevi replied that if encl. 208 was heard first then all the issues raised by Mr. Gurbachan Singh would be answered. She craved this court's indulgence to proceed to hear encl. 208 first. She submitted that this court could make an assessment on the available affidavits. She submitted that these affidavits were quite straightforward and that they were very clear and that there was no necessity to examine her on those issues.

Mr. Malik Imtiaz Sarwar responded. He drew my attention to the case of *Abdul Latif bin Mohamed Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140, a decision of the Court of Appeal. There at p. 149, the Court of Appeal said:

> In our opinion as the issue relates only on the service of the documents on the appellant and not to a question to be tried in the action, it is open to the appellant to cross-examine Mahamud on the contents of his affidavit on the service issue. This he can do by seeking leave of the court pursuant to Order 38 r. 2(3) of the RHC. Raja Azlan Shah J (as His Royal Highness then was) has the occasion to consider Order 38 r. 1 of the then Rules of Supreme Court 1957 (which is our present Order 38 r 2(3) of RHC) and its application in *Gomez v. Gomez* [1969] 1 MLJ 228 at p. 229:
>
> > It is also settled law that if the issue in the case relates, not to controverted facts appearing on the face of the affidavits but to an issue which must be tried in the action, then Order 38 r. 1 does not apply; see *Abrahams & Co v. Dunlop Pneumatic Tyre Company & Ors* [1905] 1 KB 46, 52 where Mathew LJ in considering the provisions of the (English) Order 38 r. 1, which is the same as ours said:
> >
> > > That applies only to a question of fact which the court or a Judge has at the time jurisdiction to decide, and not to a question to be tried in the action.
>
> In this case the court below has the jurisdiction to decide whether it was a fact or not that service of those documents were effected personally on the appellant by Mahamud. In fact Mahamud, in our view, had sworn a full and complete evidence of service. It was not necessary for evidence to be shown that the appellant was known personally to Mahamud or that someone else had pointed out the appellant to Mahamud as contended by Dato RR Sethu in the face of the admission by the appellant as deposed

> by Mahamud that he was the person named in those documents. The burden then falls on the appellant to show otherwise and the best way to do so is by invoking Order 38 r. 2(3) of the RHC. Mere denial does not help the appellant. He did not say for example that at the material time of the service of those documents, he was not at the stated address but was somewhere else or he had changed his address. With the benefit of the cross-examination of Mahamud only then would the court be in a position to come to a finding whether Mahamud's affidavit can be accepted or not.
>
> As the appellant failed to invoke Order 38 r. 2(3) of the RHC, the learned Judge, in our view, was on the material before him entitled to come to his own finding that these documents were indeed served on him by Mahamud. There was a delay of about three years.

He too drew my attention to the case of *T.O. Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 particularly to page 153 where Lee Hun Hoe CJ (Borneo) said:

> Many of the grounds of appeal are against the finding of facts by the learned judge. It is true that a considerable amount of evidence is documentary such as affidavits and letters. However, leave was given to cross-examine several deponents including appellant. The learned judge thus had the advantage of seeing and hearing them and was in a better position than this court to assess their credibility.

He then submitted that the primary thrust of encl. 208 was that service was not effected. The plaintiff, on the other hand, so he submitted, held onto the view that service was effected. Because of these conflicting versions, the best recourse would be to cross-examine the defendant. He submitted that only the court was in a position to decide whether the defendant should be cross-examined. It was also submitted that upon cross-examination, this court would be able to appreciate the evidence and accordingly determine whether the first ground in encl. 208 had been made out.

Madam Mahadevi responded and she submitted that the case of *T.O. Thomas* was distinguishable. According to her that case was in relation to a quasi-criminal matter. She then drew my attention to the case of *Comet Products UK Ltd v. Hawkex Plastics Ltd. And Another* [1971] 2 QB 67 especially to the decision of Lord Denning MR at p. 74 of the report and there that brilliant judge said:

> So that brings me to the final question: Ought a judge to rule that Mr. Hawkins should be cross-examined on his affidavit? It is to be remembered that this power to cross-examine is a matter for the discretion of the judge who is trying the case. If the cross-examination could be limited to the particular circumstances of this alleged contempt, then it might be right to permit it.

Finally, at p. 75, Lord Denning MR rounded it up by saying:

> Seeing, however, that cross-examination is not to be allowed, it means that the judge might think it right to disregard the affidavit, or to give it very little weight. That would be for him. In the circumstances, I do not think cross-examination should be allowed.

Writing a separate judgment, Megaw LJ in *Comet Products UK Ltd v. Hawkex Plastics Ltd And Another (supra)* said at p. 76 to p. 77 of the report:

> Therefore in my view the judge had a discretion under R.S.C. Ord. 38, r. 2(3) whether or not to allow cross-examination of Mr. Hawkins on his affidavit. In general I think that in interlocutory proceedings, where there is a *bona fide* application to cross-examine a deponent on his affidavit, that application should normally be granted. There can be no suggestion here that the application on behalf of the plaintiffs is anything other than *bona fide*. But for Mr. Hawkins it was said that, against a person whose committal for contempt of court is sought, such an order should be made only in the most exceptional circumstances. I do not accept that. The general proposition I think is too widely stated. But the fact that it is a proceeding which may result in punishment, whether by imprisonment or fine or sequestration, is not irrelevant. It is a proper factor to be taken into consideration by the judge, along with other factors, in proceedings such as this where an application for cross-examination is resisted. What weight it will have must depend on the circumstances of the particular case. In some cases it may have little or no weight. One feature which may make it of substantial weight is when it becomes apparent that the necessary result of the cross-examination, while the cross-examination is perfectly properly conducted, is likely at the best to have a very small relevance to the issue which the judge has to decide in comparison with the effect it may have on the matters in the litigation, which are not properly in issue on the contempt motion.

Mr. Gurbachan Singh took exception and he differentiated and distinguished the case of Comet Products. And at the same time he proceeded to make an oral application to delete or expunge the following words that appear at prayer (2) of encl. 234:

> or any other affidavits, if any,

He too submitted that para. 6 to encl. 233 was confined to setting aside the service of encl. 201 and other affidavits in support thereto.

Madam Mahadevi then cited the case of *President Hotel Sdn Bhd v. Datuk Bandar Kuala Lumpur and Anor (Crest Trading Sdn Bhd, intervener)* [1995] 4 MLJ 517 but that case according to Mr. Gurbachan Singh was in regard to *certiorari.*

Having heard the submissions of the parties through their learned counsel in the morning of 31 May 2001, I then adjourned and reserved my decision to the afternoon of the same day at 3pm. Meanwhile, I continued to hear other cases in chambers and I then mounted the bench as scheduled and made the following rulings:

(1) The following words appearing in prayer (1) of enclosure 234 of the English version, namely:

'and any other deponent'

to be deleted and expunged.

(2) The following words appearing in prayer (2) of enclosure 234 of the English version, namely:

'or any other affidavits, if any,'

to be deleted and expunged.

(3) Enclosure 234 to be heard first as opposed to enclosure 208.

(4) The cross-examination of the defendant, Mahadevi a/p Nadchatiram, in relation to the amended prayer (1) of enclosure 234 must be confined to the issues as alluded to in paragraphs 6 and 7 of enclosure 233 and that exercise will be carried out or conducted in open court on 15 and 16 January 2002.

I reiterate that I have kept an open mind in deciding the present case. It was purely an exercise of my judicial discretion. I did not adjudicate on encl. 208 or encl. 234. In the context of the present exercise, I was called upon to decide whether to hear encl. 208 first or encl. 234 first. It was as simple as that.

Anuar J (as he then was and who later became the Chief Judge of Malaya) in *Kumagai Gumi Co. Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789 refused the petitioner's application to cross-examine the third and fourth respondents in regard to the affidavits filed by them in the oppression petition and this was what his Lordship said (see p. 799 of the report):

> I considered all the circumstances of the case and took into account the fact that cross-examination will not advance the cause of justice. In my judgment, the matter could be decided without reference to any cross-examination since there were abundant documentary evidence that was not disputed which would enable any court in my position to arrive at a decision on the matter. In exercising my discretion, I took into account all matters advanced by the petitioner and the respondents, and weighing these, I was satisfied that discretion should be exercised against the petitioner and I accordingly dismissed the application to cross-examine contained in encl. 95.

and that was the exercise of discretion by a senior judge who later became the Chief Judge of Malaya. At any rate, all the cases alluded to in this judgment must be viewed in the context of the advice advanced by Edgar Joseph Jr. J (as he then was and who later rose as a Supreme Court judge) in the case of *Tan Lay Soon v. Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434. It would be sufficient to refer to the headnote of that case where at p. 436 it was recorded under the sub-title of "*Per incuriam*" that:

> (1) Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. Expressions of judges must be understood in relation to the subject matter before the court.
>
> (2) The High Court has inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Since there was a dispute as to whether there had been good and proper service on the defendant, the only way to resolve that dispute would be to hear encl. 234 first and at the same time to put in abeyance the hearing of encl. 208. It must be stressed that encl. 208 had not been adjudicated at all. Enclosure 208 will be heard after I have dealt with encl. 234. Shaik Daud Md Ismail JCA in *Co-Operative Central Bank Ltd & Anor v. Railway Co-Operative Multi-Purpose Society Ltd* [1999] 2 CLJ 75 laid down the law as to when cross-examination was needed. At p. 79, his Lordship aptly said:

> For the court to order cross-examination of the deponent of an affidavit in support, the respondent must challenge the truth of the averments in the affidavit. In the present case, nowhere has the affidavit in support of the application to cross-examine specifically denied or challenged the facts deposed to in the said affidavit.

and, in the context of the present case, there were differing views advanced by the parties in regard to the issue of service. The defendant challenged the plaintiff's assertion that service was properly effected and that being the case, it was appropriate that cross-examination ought to be conducted by this court. There was nothing "manifestly wrong" in this approach (borrowing the words of Lord Diplock in *Eng Mee Yong*'s case *(supra)*).

I have exercised my discretion to hear encl. 234 first. The discretion was exercised judicially and purely on the available material before me. The hearing of encl. 208 will be carried out later. This was my judgment and I so hold accordingly.